SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 28 1970
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 606

THE STATE OF MISSOURI ON THE INFORMATION OF JOHN C. DANFORTH, ATTORNEY GENERAL,
Petitioner,

vs.

J. B. "JET" BANKS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

JOHN C. DANFORTH
Attorney General
Supreme Court Building
Jefferson City, Missouri 65101

CHARLES B. BLACKMAR
Special Ass't. Attorney General
7305 Maryland
St. Louis, Missouri 63130
Counsel for Petitioner

KELLY PRESS, INC., 311 South Eighth Street, Columbia, Missouri Dial 449-4189

INDEX

Opinions below 1

Jurisdiction 2

Question Presented 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 4

Reasons for Granting the Writ 6

Appendices

A. Information in the Nature of Quo Warranto .. 11

B. Opinions delivered April 24, 1970 15
(1) Opinion of the Court by Morgan, J. 15
(2) Concurring Opinion of Finch, J. 23
(3) Concurring Opinion of Howard, Special Judge 27
(4) Dissenting Opinion of Sailer, J. 31

C. Judgment of April 24, 1970 37

D. Motion for Rehearing 39

E. Order of June 8, 1970 denying Motion for Rehearing 43

Table of Cases

Baker v. Carr, 369 U.S. 186 (1962) . 6, 7, 8, 16, 28, 30, 31

Bond v. Floyd, 385 U.S. 116 (1966) ... 7, 8, 9, 17, 28, 31

Coleman v. Alabama, 377 U.S. 129 (1964) 6

Hadley v. Metropolitan Junior College District, 397 U.S. 50 (1970) 8

Holtz v. Daniel Hamm Drayage Co., 337 Mo. 532, 209 S.W.2d 633 (1948) 7

Hunter v. Erickson, 393 U.S. 385 (1969) 6

Lucas v. Colorado General Assembly, 377 U.S. 713 (1964) 8, 41

Mulumby v. Shapleigh Hardware Co., 395 S.W.2d 221 (Mo.App. 1965) 7

Powell v. Huffman, 358 Mo. 136, 213 S.W.2d 472 (1948) 7

Powell v. McCormick, 395 U.S. 486 (1969) 7, 17, 31

Reynolds v. Sims, 377 U.S. 533 (1964) ... 6, 7, 19, 22, 28

State ex inf. Dalton v. Mosley, 365 Mo. 711, 286 S.W.2d 721 (1956) 4

State ex inf. McKittrick v. Wymore, 345 Mo. 169, 132 S.W.2d 979 (1939) 9

Toth v. Kalt, 780 U.S. 366 (1947) 8, 19

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 6

Constitutional Provisions

United States Constitution, Article VI 2

Amendments to the United States Constitution, Art. XIV, Sec. 1. 2

Missouri Constitution, Article III, Sec. 4, 12, 18 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. _____

THE STATE OF MISSOURI ON THE INFORMATION OF JOHN C. DANFORTH, ATTORNEY GENERAL,
Petitioner,

vs.

J. B. "JET" BAKER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

The petitioner, the State of Missouri, at the relation of its Attorney General, respectfully petitions the Court for a writ of certiorari to review the final judgment of the Supreme Court of Missouri, dismissing the information in the nature of quo warranto directed against the respondent, and asks that, on hearing, the Court reverse the judgment of the Supreme Court of Missouri and remand the case for such further proceedings and with such directions as this Court shall deem proper.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri (Appendix B-1) together with two concurring (App. B-2 and B-3)

and one dissenting opinion (App. B-4) are reported 454 Southwestern 2d 498.

JURISDICTION

The judgment of which review is sought was entered April 24, 1970. (App. C.) A timely petition for rehearing was filed (App. D.) and was overruled on June 8, 1970. (App. E.) This Court has jurisdiction under 28 U.S.C. Sec. 1257.

QUESTION PRESENTED

Does a state deny equal protection of the laws by allowing an individual to take and to hold his seat in the state legislature, when he manifestly lacks the residency requirements established by the state constitution and applicable to all other legislators?

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

Article VI

This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

• • •

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

Constitution of Missouri

Article III

Section 4. Qualifications of representatives.—Each representative shall be twenty-four years of age, and next before the day of his election shall have been a qualified voter for two years and a resident of the county or district which he is chosen to represent for one year, if such county or district shall have been so long established, and if not, then of the county or district from which the same shall have been taken.

• • •

Section 13. Vacation of office by removal of residence.—If any senator or representative remove his residence from the district or county for which he was elected, his office shall thereby be vacated.

• • •

Section 18. Appointment of officers of houses—jurisdiction to determine membership—power to make rules, punish for contempt and disorderly conduct and expel members.—Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; may determine the rules of its own proceedings, except as herein provided; may arrest and punish by fine not exceeding three hundred dollars, or imprisonment in a county jail not exceeding ten days, or both, any person not

a member, who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence during its sessions; may punish its members for disorderly conduct; and, with the concurrence of two-thirds of all members elect, may expel a member; but no member shall be expelled a second time for the same cause.

STATEMENT OF THE CASE

The respondent was purportedly elected to the Missouri House of Representatives on November 5, 1968, as representative from the 54th Legislative District, which lies wholly within the City of St. Louis. The oath of office was administered to him. No member of the House of Representatives called the attention of the House to any question about his right to sit, before that body, during any of the four sessions it held prior to the date of judgment.

In April of 1969, while the legislature of the state was meeting in its initial session, the petitioner filed an information in the nature of quo warranto (App. A), seeking to oust the respondent from his office. The information charged alternately, that he was not and never had been a resident of the district from which he was elected, or that he had not been a resident of the district for one year prior to his election, but rather resided in Richmond Heights in St. Louis County. The information alleged in express terms that the residents of the district from which Respondent was chosen were deprived of equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment, in being represented by a nonresident when all other districts in the state were required to be represented by residents. The action was filed directly in the Supreme Court of Missouri, as is authorized by Missouri law. See State ex inf. Dalton v. Mosley, 365 Mo. 711, 286 S.W.2d 721. That case holds that information in the nature of quo warranto is the appropriate procedure for testing title to office.

The respondent moved to dismiss the information. The motion was taken under advisement and an answer was filed. Then the Court appointed a Special Commissioner to take testimony and prepare recommended findings and conclusions. The Commissioner found that the respondent did not live in the district and had not lived there for one year prior to his election. He found that the residents of the district were thereby deprived of equal protection of the laws, and recommended that the Respondent be ousted.

The Supreme Court of Missouri, however, then sustained the motion to dismiss, on the basis that the state constitution constituted the House of Representatives the "sole judge" of the election and qualifications of its members, that the legislature in suffering the oath of office to be administered to Respondent necessarily resolved any question of qualification in his favor, and that there was no indication of "continuing inaction" on the part of the legislature in failing to exclude the Respondent from his office. The majority opinion (App. B-1) found no claim of "arbitrary or discriminatory failure to apply uniform standards," or of "invidious discrimination," such as to constitute a violation of the equal protection clause.

There were two concurring opinions and a dissenting opinion. The dissent (App. B-4) pointed out that there was no serious challenge to the assertion that the Respondent did not and had not lived in his district for one year prior to the election, that the legislature had met in four sessions since the Respondent took office and had ample opportunity to act, and that this state of affairs demonstrated a violation of the "equal protection" clause. One concurring opinion sought to place the decision on procedural grounds not adopted by the majority (App. B-3), while the other took direct issue with the dissent on the equal protection issue. (App. B-2.)

A motion for rehearing was filed (App. D), demonstrat-

ing that the Court necessarily had to resolve the "equal protection" point since nobody except a member of the House of Representatives had authority to challenge a member's right to serve, and since the legislature could not, even by unanimous consent, sanction or perpetuate a situation which constituted deprivation of the equal protection of the laws. The motion was denied (App. E.) and this petition followed.

REASONS FOR GRANTING THE WRIT

1. The right to be represented by a resident of one's district is an important right. There is an invidious discrimination if this right is afforded to some citizens and denied to others. When the state chooses to impose a residence requirement in its constitution, the requirement must be applied equally. Directly in point is **Hunter v. Erickson**, 393 U.S. 385 (1969), holding that a city may not require a referendum for an ordinance dealing with equal opportunity and prevention of racial discrimination, when the referendum is not allowed in the case of other ordinances.

The Court held that the city might allow a referendum or not, as it saw fit, but that it could not permit a referendum in some cases and deny it in others in such a way as to deprive persons of equal protection of the laws. What is held there as to referenda applies very clearly to residency requirements.

It is of no significance that discrimination is not apparent from the face of the state constitutional and statutory provisions. There is a deprivation of equal protection if the total effect of the state action in question is to sanction invidious discrimination. **Yick Wo v. Hopkins**, 118 U.S. 356 (1886); **Cooper v. Aaron**, 358 U.S. 1 (1958); **Coleman v. Alabama**, 377 U.S. 129 (1964); **Baker v. Carr**, 369 U.S. 186 (1962); **Reynolds v. Sims**, 377 U.S. 533 (1964).

2. The authority of the state legislature to judge of the election and qualifications of its members may not be imposed in such a way as to prevent judicial redress for violation of constitutional rights. This is made clear by Bond v. Floyd, 385 U.S. 116 (1966), which put an end to any doubt that might have existed in the past. There this Court held that a state legislator could not be denied his seat when the effect of the denial was to interfere with his exercise of freedom of speech. See also Powell v. McCormick, 395 U.S. 486 (1968), as indicating the availability of judicial relief against the action of the legislature.

This is not a case in which the state House of Representatives undertook an inquiry into the Respondent's eligibility and made a decision. There is no serious claim that the Respondent resided in his district for one year preceding his election. The case, furthermore, was decided on motion to dismiss, which under Missouri law admits the factual allegations of the pleading to which it is directed.[1] On this record, then, the legislature had a positive duty to act and ample opportunity to do so. The courts have a duty to protect citizens against deprivation of equal protection of the laws arising out of legislative inaction. Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964). Unless this is so there could be a frank violation of the Constitution, without any remedy.

It is of no significance that a plurality of the voters who participated in the election chose the Respondent to represent them. The right to be represented by a resident belongs to all in the district, whether they voted for the Respondent or opposed him. The majority may not, even by consent, suffer the deprivation of equal protection of the

---

[1] Cases applying this elementary rule of pleading are legion. See e.g. Holtz v. Daniel Hamm Drayage Co., 357 Mo. 538, 209 S.W.2d 883 (1948); Powell v. Huffman, 358 Mo. 138, 213 S.W.2d 473 (1948); Molumby v. Shapleigh Hardware Co., 395 S.W.2d 221 (Mo.App. 1965).

laws. This follows from **Lucas v. Colorado General Assembly**, 377 U.S. 713 (1964), holding that the fact that unequal legislative districts had been approved by the voters of the state in a referendum did not stand in the way of a finding of denial of the equal protection of the laws.

Since the legislature had a duty to act and did not, the courts have the duty to step in. A state court may not divest itself of the responsibility for enforcing the federal constitution and statutes. **Testa v. Katt**, 330 U.S. 386 (1947). Nor does the opinion of the Supreme Court of Missouri indicate that that court felt that it was utterly without power in the premises. It proceeded instead on the unsound theory that some sort of application to the legislature was necessary. It is clear, however, that nobody who is not a member of the legislature has the authority to institute an inquiry before it or to bring any kind of challenge. By the court's reasoning, the legislature itself could forestall any kind of challenge based on the equal protection clause. This contention is clearly refuted by **Bond v. Floyd**, 385 U.S. 116 (1966).

3. The question is of general importance. The citations in the opinion below show that numerous states have residency requirements similar to Missouri's. This Court has shown great concern for the rights of suffrage and representation, as shown by the long line of cases from **Baker v. Carr**, 369 U.S. 186 (1962) to **Hadley v. Metropolitan Junior College District**, 397 U.S. 50 (1970). The record shows another kind of discrimination in representation which affects the substantial rights of voters and which should be eliminated.

4. The case does not become moot even though the Respondent's term might expire before proceedings are completed. His term will expire on December 31, 1970. By Missouri law, however, the courts have jurisdiction over actions of quo warranto to test title to office which is not divested

by expiration of the term. If the officeholder is found to be an usurper, he may be fined as a part of the quo warranto proceedings. This was expressly held in State ex. inf. McKittrick v. Wymore, 345 Mo. 169, 132 S.W.2d 979 (1939). He may also, very probably, be obliged to account for his salary. Cf. Bond v. Floyd, 385 U.S. 116 (1966).

Respectfully submitted,

JOHN C. DANFORTH
Attorney General
Supreme Court Building
Jefferson City, Missouri 65101

CHARLES B. BLACKMAR
Special Ass't. Attorney General
7305 Maryland
St. Louis, Missouri 63101

Counsel for Petitioner

APPENDIX A

IN THE SUPREME COURT OF MISSOURI

THE STATE OF MISSOURI ON THE INFORMATION OF JOHN C. DANFORTH
Petitioner,

vs.

J. B. "JET" BANKS
Respondent.

Information in the Nature of Quo Warranto

(Filed March 25, 1969)

John C. Danforth, Attorney General of the State of Missouri, who prosecutes this information in his official capacity as such on behalf of the state, respectfully shows to the court:

1. This is an application for an original remedial writ and this court has jurisdiction under Article V, Section 4 of the Constitution of the State of Missouri.

2. At the general election held November 5, 1968, the Respondent, J. B. "Jet" Banks was a candidate for election to the State House of Representatives from the 54th Legislative District, and was certified as having been elected to the said office.

3. The 54th Legislative District is wholly located within the City of St. Louis, and in the 8th, 18th, and 19th wards of the said city. It was first established at the general election for the year 1966, at which election a candidate other than Respondent was elected to represent the said district.

4. (a) Respondent does not now reside in, and never has resided in the 54th Legislative District but rather now resides and for many years has resided at 1615 Bredell Street, in the City of Richmond Heights, St. Louis County, Missouri, which address is in the 40th Legislative District.

(b) Alternatively, Respondent was not a resident of the 54th Legislative District for one year before the day of election, he having registered as a voter at an address within said district on May 3, 1968, which date was after his filing of a declaration of candidacy for the office of Representative for the said 54th District.

5. Petitioner verily believes and therefore alleges that the address of 3129 Lucas Avenue, which Respondent gave on his declaration of candidacy for the office of Representative for the 54th District, and at the time of his registration for voting on May 3, 1968, is a wholly fictitious address for Respondent, and that Respondent does not now and never has resided at said address.

6. (Article III, Section 4) of the Constitution of the State of Missouri provides that representatives in the general assembly shall reside in the districts from which they are elected and shall have resided in such districts for one year next before the election at which they are elected. (Article III, Section 13) of the said Constitution provides that a representative who shall remove himself from his district shall forfeit his office. Respondent purports to hold office in violation of the aforesaid constitutional provisions and he is therefore usurping, intruding into and unlawfully holding the said office.

7. Under Sections 4 and 13 of Article III of the Constitution of the State of Missouri, the residents of the 54th Legislative District have the right to be represented by a person who resides in the district. Since other citizens of the State of Missouri are represented by representatives who reside within their respective districts, the residents of the 54th District are deprived of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States in being represented by Respondent, he being a nonresident of the district as aforesaid.

Respondent therefore purports to hold the office of representative in violation of Sections 4 and 13 of Article III of the Constitution of Missouri, and in violation of the Fourteenth Amendment to the Constitution of the United States, and in so doing he usurps, intrudes into, and unlawfully holds the said office.

3. Unless ousted by this court the Respondent will continue to usurp, intrude into, and unlawfully hold the office of Representative from the 54th Legislative District.

Wherefore, Petitioner prays that process issue directing that Respondent appear and show cause why he should not be ousted from the office of Representative for the 54th District as aforesaid, and that on hearing the court enter its judgment of ouster, and for such further relief in the premises as to the court may seem just.

JOHN C. DANFORTH
Attorney General
Supreme Court Building
Jefferson City, Missouri

APPENDIX B-1

Opinion of the Supreme Court of Missouri

(Filed April 24, 1970)

In this original proceeding, the Attorney General of Missouri, herein referred to as the petitioner, filed an information in the nature of quo warranto seeking a judgment of this court that J. B. "Jet" Banks, respondent, be ousted from the office of State Representative for the 54th Legislative District of Missouri. In addition to filing his return, respondent filed a motion to dismiss the information on the basis that this court lacked jurisdiction of the subject matter. The motion was ordered taken with the case, and a special commissioner was appointed to hear evidence and report his findings and conclusions. His report has now been filed.

Factually, it is agreed that respondent at the General Election held November 5, 1968, was a candidate for the State House of Representatives from the 54th Legislative District, was certified by the Secretary of State as having been elected, was given the oath of office and is presently serving as the legislator for said district. It was further stipulated that said district was located wholly within the City of St. Louis, and that 1615 Bredell Avenue is located in Richmond Heights, Missouri. Petitioner alleges that respondent has resided at the latter address, which is located within the 40th Legislative District, for many years and has never resided in the district from which he was elected. After an evidentiary hearing, the commissioner reached the same conclusion.

Initially, we must consider respondent's challenge to the jurisdiction of this court. This contention is premised on those constitutional provisions (Constitution of Missouri 1945) which provide that each house of the General Assembly shall be the sole judge of the qualifications of its own members. Relevant constitutional sections are, in part, as follows:

Art. III, Sec. 4. Qualifications of representatives.—Each representative shall be twenty-four years of age, and next before the day of his election shall have been a qualified voter for two years and a resident of the county or district which he is chosen to represent for one year, . . .

Art. III, Sec. 13. Vacation of office by removal of residence.—If any senator or representative remove his residence from the district or county for which he was elected, his office shall thereby be vacated.

Art. III, Sec. 18. * * * jurisdiction to determine membership * * *.—Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; * * * with the concurrence of two-thirds of all members elect, may expel a member; . . .

This court does have jurisdiction by virtue of Art. V, Sec. 4, which provides, "The supreme court . . . may issue and determine original remedial writs." The case as submitted calls for construction of the constitution which requires the performance of perhaps our most important function. In so doing, we must resolve whether or not a justiciable issue is presented. In this task, we have the added guidance of the recent decision of the Supreme Court of the United States in **Baker v. Carr**, 369 U.S. 186. Therein, it was determined that the "political question doctrine" might make non-justiciable those cases wherein there was found, l.c. 217, "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack

of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." The court also concluded that a political question could result if it were found that any one of the factors listed was inextricably present.

As is obvious by **Art. III, Sec. 18,** of the Constitution of Missouri, the people of this state have specifically made a "textually demonstrable constitutional commitment" to its house of representatives power to be the "sole judge" of the qualifications of its own members. That fact is not debatable. The scope of this constitutionally delegated power recently has been not only recognized but more precisely defined by the Supreme Court in **Bond v. Floyd,** 385 U.S. 116, and **Powell v. McCormack,** 395 U.S. 486. **Bond** considered exercise of the power by the legislative department of a state and **Powell** the exercise of a similar power by the house of representatives of Congress. In each case, while considering a question of "exclusion" of a potential member and not the power of "expulsion," the court held that the power, so delegated, was limited to a determination by the legislative body of whether or not that person challenged met those standards constitutionally established. The constitution of this state, Art. III, Sec. 4, provides that age, qualification as a voter and residency are to be standing qualifications, and as such, both by historical precedent and the recent articulations of the Supreme Court, necessarily come within the scope of the power so delegated. Such a conclusion is not indicative of a reluctance of this court to accept its responsibility as the ultimate interpreter of the constitution, but to the contrary, it is evidence of this court's appreciation of its duty to interpret the constitution as it was written by and for the citizens of his state. We have the duty and obligation to protect the right of the legislative

department, as we would also the executive branch, to exercise those powers specifically delegated to it in the same manner we would a similar challenge to the powers of the judiciary. Refusal to do as much would constitute an encroachment upon the legislature by this court and do violence to that separation of powers so fundamentally vital to our form of government. Art. II, Sec. 1, Constitution of Missouri, 1945. "For any one of the three equal and co-ordinate branches of government to police or supervise the operations of the others strikes at the very heart and core of the entire structure." Am.Jur.2d, Constitutional Law, Sec. 213. Although now specifically incorporated in the constitution of the federal government and the many states, the power of a legislative body to judge the qualifications of its own members is of ancient origin. "The history of the doctrine reveals that it was established in the constitutional law of England in the year of 1586, during the reign of Queen Elizabeth." **Lucas v. McAfee**, 217 Ind. 534, 29 N.E.2d 403, 405. Although fully convinced of the correctness of our decision, we could not deny taking some solace in the fact that no case has been cited, nor has our research revealed any, in which any court has ever ruled otherwise. **Hiss v. Bartlett**, 69 Mass. 468, 473, 63 Am. Dec. 768; **State ex rel. Acker v. Reeves**, 229 Ind. 126, 95 N.E.2d 838; **French v. State Senate**, 146 Cal. 604, 80 Pac. 1031; **State ex rel. Ford v. Cutts**, 53 Mont. 300, 163 Pac. 470; **Rainey v. Taylor**, 166 Ga. 476, 143 S.E. 383; **Reif v. Barrett**, 355 Ill. 104, 188 N.E. 889; **Lessard v. Snell**, 155 Or. 293, 63 Pac.2d 893; **Bowling v. Weakley**, 181 Md. 496, 30 A.2d 791; **Preisler v. Doherty**, 364 Mo. 596, 265 S.W.2d 404. It has not been alleged that respondent has changed his residence since he was originally found qualified, and we express no view on the provisions for "expulsion" or for forfeiture found in Art. III, Sec. 13.

We next consider the petitioner's arguments that: (1) "The equal protection clause of the Fourteenth Amendment

is violated when the State fails to apply its qualifications for legislative representation uniformly on behalf of all residents of the State," and, (2) "Abridgment of the equal protection clause makes this case justiciable and overrides the provisions of the state constitution establishing each house of the legislature as judge of the qualifications of its members." Obviously, the generalization expressed in Point (2) is well taken, as this court recognizes that when a federal constitutional right conflicts with a state constitutional provision, it is our duty to enforce the former by virtue of the supremacy clause. Art. VI, United States Constitution. **Testa v. Katt**, 330 U.S. 386; **Cooper v. Aaron**, 358 U.S. 1. However, this duty comes into play only when it becomes apparent there has been, in fact, a denial of some federally protected right.

Petitioner concedes that there is no judicial precedent on the specific issue submitted. However, argument is made that residency is a critical aspect of representative government, and that quality of representation is "dependent on the person so elected sharing a community of interest with an understanding of the problems of his constituents." From this premise, it is asserted that residents of the 54th Legislative District are being denied this benefit and thus are deprived of the equal protection of the laws. By analogy, petitioner relies on **Baker v. Carr, supra**, and **Reynolds v. Sims**, 377 U.S. 533. Each of which involved legislative apportionment and held that the equal protection clause had been violated by continuing legislative inaction shown by failure to reapportion districts to conform to the one-man one-vote principle. Inaction was found to be an unavailing answer when there was an affirmative duty to act. However, in the instant case, "inaction" has neither been alleged nor proven. From the record before this court, there is no showing that the legislative body neglected its constitutional duty and failed to act in the premises. In view of respond-

ent having been given the oath of office, absent a charge to the contrary, we must assume that his qualifications were resolved in compliance with the constitutional mandate. In other words, the information as filed does not charge an "invidious" discrimination by inaction, but suggests, by implication only, that the legislature reached an erroneous conclusion in the case of respondent. Neither is it alleged that such a decision, even if in error, was the result of an arbitrary or discriminatory failure to apply uniform standards; nor is there any contention or suggestion that facts known to petitioner were available or have been called to the attention of the legislature, that it might reconsider its decision if it were found to be ill founded. By these comments, we do not infer the result herein reached would be different, but they are made for the purpose of pointing up the absence of an important factor distinguishing this case from **Baker** and **Reynolds, supra.** For in each, the fact a legislative body evidenced continuing inaction and showed no willingness to assume its obligation was found to be further justification for a court to assume jurisdiction.

Further, we are not inclined to accept the analogy suggested in view of the declarations to the contrary in two recent opinions of the Supreme Court. Justice Douglas, while concurring in **Baker v. Carr, supra,** l.c. 246, said, "Where the Constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene," and later in **Powell v. McCormack, supra,** l.c. 552, "Contests may arise over whether an elected official meets the qualifications of the Constitution, in which event the House is the sole judge." We further add, that the instant case is also distinguishable, from those cited, by virtue of the fact the deprivation, if any, was self created and is subject to remedy by the same process that created it.

Even though it be asumed that the legislature has erred in this isolated instance (respondent is one of 163 members),

we respect the desire of the members thereof to act conscientiously. "The legislative function, except as limited by state or national constitutions, is equal and not subordinate to the judicial function, and the legislature is the ultimate guardian of the liberties and welfare of the people in quite as great a degree as the courts." C.J.S., Constitutional Law, Sec. 106, p. 491.

Finding the information fails to state a justiciable cause of action, respondent's motion to dismiss is sustained. Costs are assessed against petitioner.

/s/ J. P. MORGAN, JUDGE

Henley, C.J., Donnelly and Holman, J.J., concur; Finch, J., and Howard, Sp. J., concur in result in separate concurring opinions filed; Seiler, J., dissents in separate dissenting opinion filed.

APPENDIX B-2

Concurring Opinion
(Filed April 24, 1970)

I concur in the conclusion reached in the principal opinion that we should not oust respondent Banks in this proceeding. In so doing, however, I would not reach or decide the issue of whether or not this court has a right to inquire into the right of a legislator to continue to hold his office when an attack thereon arises as to his qualifications under Art. III, §§ 4 or 13 of the Constitution of Missouri, 1945. The Attorney General's brief does not ask that we enforce the Missouri constitutional provisions and oust respondent on the basis thereof. Instead, the sole basis advanced by petitioner's brief for ousting Banks is that he was not a resident of his district as required by the Missouri Constitution, resulting in a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. This equal protection issue is the only question briefed and relied on by the Attorney General and the only question we are called upon to decide herein.

The Attorney General recognizes that there is no requirement in the Federal Constitution that a state require a legislator to live in the district from which he is elected. Nevertheless, he says that since the State Constitution so requires, a failure to enforce that requirement uniformly as to all districts in the state constitutes unequal treatment of the residents of the districts and therefore violates the federal equal protection clause.

Considerable reliance is placed by petitioner on the cases of **Baker v. Carr**, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, and **Reynolds v. Sims**, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506. The basic principle established in these so-called one man, one vote cases is that the Constitution of

the United States protects the right of all qualified citizens to vote and to have their votes counted, and that this includes protection from having one's vote diluted or debased. The rule is established therein that apportionment of legislative districts must be made in such a manner as to give equal weight to the votes of all. In this quo warranto proceeding there is no contention advanced that the votes of the residents of the 54th Legislative District were diluted or that their votes did not count for as much as votes of persons in other districts in the state. Instead, the petitioner says that the election of respondent, who did not live in the 54th Legislative District,[1] resulted in unequal protection to them in that their representative did not know the problems of the district or share their interest as is true in the case of legislators who are residents of their districts. So far as I can ascertain, the United States Supreme Court has not up to this time held that failure of a state to enforce a state eligibility requirement for legislators, such as residence or age, would violate the equal protection clause of the Fourteenth Amendment. Nor is any case cited from which I can conclude with confidence that the Supreme Court would so hold if and when such issue is presented to them. Nonresidence of the legislator elected is not necessarily comparable to situations in which the votes of persons are diluted by unequal apportionment of the districts, and in the absence of a determination by the Supreme Court of the United States that failure on the part of the state to enforce its residence or age requirements constitutes a violation of the

---

[1] Our Special Commissioner, based on the evidence which he took, found that respondent Banks did not reside in the 54th Legislative District for the entire year next before the date of his election. The evidence is amply sufficient to sustain that finding. The respondent did not testify before the Special Commissioner, nor did his wife, and when relator by pretrial discovery sought to have them answer interrogatories or to give their depositions as to their place of residence, they invoked the Fifth Amendment to the Constitution of the United States and declined to answer.

equal protection clause of the Fourteenth Amendment, I do not believe that we as a state court should further extend the application of this federal constitutional provision.

Petitioner also cites and relies upon **Bond v. Floyd**, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235. In that case the Georgia House of Representatives undertook to deny membership to Bond on the basis of statements he had made criticizing the policy of the Government in Vietnam and the operation of the Selective Service System. The Supreme Court held that this action by the Georgia House of Representatives violated Bond's First Amendment rights and that the House of Representatives could not refuse to seat him on that basis. I do not consider that the Bond case is at all analogous to the situation here presented.

Accordingly, I would hold simply that no violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States has been shown, and since this is the only basis briefed and argued by the Attorney General for ousting respondent, I would hold in favor of the respondent and dismiss the quo warranto proceeding.

/s/ JAMES A. FINCH, JR., JUDGE

APPENDIX B-3

Concurring Opinion

(Filed April 24, 1970)

I concur in the result of refusing to order ouster. However, I reach this result because I do not believe that the record in this case presents any issue requiring a ruling on the merits thereof.

The evidence abundantly supports the finding of the commissioner that respondent was not a resident of his district as required by the Missouri Constitution. This fact situation raises three possible issues, two under the Missouri Constitution and one under the United States Constitution. These are: (1) respondent's disqualification under Article III, Section 4, of the Missouri Constitution (which requires that each representative next before the day of his election shall have been a resident of the district which he is chosen to represent for one year) and this court's jurisdiction to oust respondent because of such disqualification in view of the provision of Article III, Section 18, that each house of the General Assembly shall be the sole judge of the qualifications of its own members; (2) respondent's forfeiture of his office because of removing his residence from the district for which he was elected, as provided in Article III, Section 13, of the Missouri Constitution; and (3) the violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution resulting from the representation of the residents of respondent's district by a nonresident.

The information in the nature of quo warranto filed by the Attorney General in this case does not plead forfeiture under Article III, Section 13, of the Missouri Constitution (number 2 above), and does not pray for relief on that basis. Likewise, relator's brief in this court does not contend for ouster on this basis. I, therefore, concur with Judge Morgan's opinion that this issue is not before us for decision.

As to the first issue listed above, i.e. respondent's disqualification because of nonresidence and this court's jurisdiction to take action based thereon, relator does raise this issue in his pleading but the question is not briefed by him in this court. Respondent's brief does attack the jurisdiction of this court but relator's brief does not urge that we do have jurisdiction to act on this basis. Thus, this question is not properly before this court for consideration and should not be decided. The jurisdictional question involved is one of considerable difficulty and uncertainty and should not be decided without complete briefing on both sides of the question. Further, the record in this case is silent, both in pleading and proof, as to what occurred in the legislature, either at the time respondent was seated or afterwards. For all that appears in the record, respondent may have been seated through sheer oversight or inadvertence. This court cannot base its decision on what its members may individually and personally know. Such a record does not require a decision on this difficult and important jurisdictional question.

I, therefore, concur with Judges Finch and Seiler that the only issue properly briefed, argued and submitted to this court is the one having to do with equal protection. However, I must agree with Judge Morgan that " 'inaction' has neither been alleged or proven". The Fourteenth Amendment to the Constitution of the United States provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. While inaction may amount to denial as is shown by the cases cited in Judge Morgan's opinion, (see **Baker v. Carr**, 369 U.S. 186, and **Reynolds v. Sims**, 377 U.S. 533), the record in the case at bar does not show that this is not an isolated instance and does not show that it is not the result of inadvertence. Consequently, I do not believe that the inaction shown by the record amounts to denial and I do not believe that the proven fact of non-

residence, plus our judicial knowledge that this General Assembly has met in four different sessions, as pointed out by Judge Seiler, is sufficient to raise this case to the stature necessary to show a violation of equal protection. This is not to be understood to mean that I believe that if this situation were the result of knowing inaction or refusal to act on the part of the legislature, this court should not grant ouster. It simply means that "inaction" which will result in a violation of equal protection must be knowing inaction and, regardless of our personal knowledge, the record before us does not demonstrate that there was knowing inaction on the part of the House of Representatives.

For these reasons, I concur in refusing to oust respondent.

/s/ FRED L. HOWARD, SPECIAL JUDGE

APPENDIX B-4

Dissenting Opinion

(Filed April 24, 1970)

I agree with Judge Finch that the equal protection issue is the question which was briefed, argued, and which must be decided in this case. What we would do if we were deciding this case solely on the provisions of the Missouri Constitution (as was the case in **Bond v. Floyd**, 385 U.S. 116, where the question was whether Georgia could add qualifications beyond those set by the state constitution, and as was the case in **Powell v. McCormack**, 395 U.S. 486, where the House of Representatives was attempting to add to the qualifications stated in the federal constitution) is beside the point. Nor does the matter of "a textually demonstrable constitutional commitment of the issue [by the Missouri Constitution] to a coordinate political department" [the Missouri House of Representatives] meet the equal protection issue raised, because as the majority opinion well says, we recognize ". . . that when a federal constitutional right conflicts with a state constitutional provision, it is our duty to enforce the former by virtue of the supremacy clause. Article VI, United States Constitution . . ." We observe, also, that in **Baker v. Carr**, 369 U.S. 186, from which the "textually demonstrable constitutional commitment" language is taken, the appellants' claim that they were being denied equal protection was nevertheless there held justiciable. The "textually demonstrable" doctrine relates to the relationship between coordinate branches of the same government and ". . . is primarily a function of the separation of powers . . .", **Baker v. Carr, supra**, 369 U.S. l.c. 210, but the claim here asserted is a federally protected right and involves different governments, not merely separate branches of the same one.[1] As in **Baker v. Carr**, the question here is

---

[1] It does not seem to me that the language of Justice Douglas from Baker v. Carr, supra, and Powell v. McCormack, supra, quoted on

". . . the consistency of state action with the Federal Constitution . . .", 369 U.S. lc. 226, and there is no question decided or to be decided by a political branch of Missouri government which could override the right to equal protection guaranteed by the 14th Amendment of the federal constitution.

Respectfully, I am unable to agree with Judge Morgan that "inaction" on the part of the legislature has not been proven, or with Judge Finch that there has not been a violation of the equal protection clause of the 14th Amendment. I would grant ouster.

On the first point: On the record before us, there can be no doubt as to the correctness of our commissioner's findings that respondent, although seated as a member of the 54th district following the November 5, 1968 election, did not in fact reside in the 54th district for the entire year next before the day of his election or for all of the period after

---

page 6 of Judge Morgan's opinion supports the proposition that because the Missouri Constitution provides each house shall be the sole judge of its qualifications, we are powerless to act in this case.

In both Baker v. Carr and Powell v. McCormack, Justice Douglas was referring to a situation where the federal constitution having assigned a particular function to another department of the federal government, the federal judiciary will not intervene. In Baker v. Carr, he supported his statement by citing Oetjen v. Central Leather Co., 246 U.S. 297, 302, which held that since the federal constitution commits the conduct of foreign relations to the executive and legislative branches, the exercise of such political power was not subject to the federal judiciary. In Powell v. McCormack, he was pointing out that Congress had no power to alter the constitutional qualifications for membership and in the next sentence after that quoted by Judge Morgan, Justice Douglas went on to say, ". . . But the House is not the sole judge when 'qualifications' are added which are not specified in the Constitution", 395 U.S. l.c. 552.

I do not believe that Justice Douglas' words can be taken as holding in any way that the commitment by the Missouri Constitution to the House of Representatives to be the sole judge of the qualifications of its members bars us from acting in this case, where there is a federally protected right to equal protection being denied as result of the failure of the House to act.

the election, but was, in fact, a resident of an entirely different district, the 40th, residing therein at 1615 Bredell Avenue, Richmond Heights. The record shows there is a home at this address, with a garage, yard, and a back yard with a barbecue pit. This is where respondent and his wife were seen going and coming. It is where respondent put up Christmas tree lights and the address from which he complained to the police that children were stealing Christmas tree lights from his front yard. This is the house and address where respondent barbecued, where his wife put out the trash cans, where he removed grass trimmings, where mail was delivered to him. The joint income tax returns for respondent and his wife for 1966 and 1967 showed 1615 Bredell Avenue as their home address. Respondent's driver's license application gave 1615 Bredell as his address. Mrs. Banks gave it as her address on her application for renewal of her nurse registration. Electric and water utilities showed respondent as the customer at the address.

Although respondent attempted to make a factual showing as to residency by calling several of his own witnesses, it is highly significant that the man who should know the most about it, respondent himself, saw fit not to testify. This is not a criminal case. There is no presumption of innocence involved and the ban against attaching significance to the failure of the defendant to take the stand does not apply. It is reasonable to conclude that respondent did not testify for the reason his testimony would have been unfavorable to him. Respondent's wife did not testify either. In sum, there is a complete absence of any convincing evidence in the record contrary to our commissioner's findings.

Under these circumstances I do not see where we can indulge the assumption that the legislature has not neglected its duty and failed to act. This legislature, the Seventy-Fifth General Assembly, has been in session several times, twice in 1969 and twice so far in 1970, yet respondent continues

in office.[2] Under the record before us, at none of the times material to the residency issue, could the House have made a finding supported by any reasonable evidence that respondent met the residency requirements of the Missouri Constitution. There has been a clear showing of continuing inaction and no evidence of willingness to act on the part of the legislature.

On the second point: As Judge Finch says, petitioner is not arguing that the votes of the residents of the 54th district were diluted, but does argue that the election of respondent, a non-resident of the district, resulted in unequal protection to them, because they, unlike the residents in the other districts over the state, were denied representation by one of their own residents and were represented by an outsider—a sort of carpetbagger in reverse situation. It cannot be doubted that Missouri places a high value on the right of voters in a particular district to be represented by a representative who resides in their district. The Missouri Constitution is at pains to make this a requirement for election and for remaining in office, Art. III, Secs. 4 and 13. It is a substantial and not a trivial right of the voters. Here it is being denied the voters of the 54th district in a way that denies them equal protection. Not only are they denied equal protection once the election is over, as compared to those who have a representative who resides in the district in the matter of knowing the problems of the district and sharing the interests of the residents thereof, they are denied equal protection in the election itself. For in the 54th district, the only way a voter could vote for a candidate who, if elected, would be a resident of the district, would be to vote for respondent's opponent. Thus, a voter who wanted

---

[2] The regular session ran from January 8 to June 30, 1969, the first extraordinary session from September 8 to September 30, 1969, the second extra session from January 19 to Febraury 2, 1970, and the third extra, commencing April 15, 1970, is still in session.

to vote for a candidate who resided in the district, actually had no choice in the 54th district. He could do this only by voting for respondent's opponent, even though the latter might not be of the voter's political party. Contrast this with the other legislative districts over the state where both candidates at the general election were residents of the district. The voter in such a district had a choice: either one could be elected and the voter would still be represented by a resident of the district.

It does not seem to me that merely because the United States Supreme Court has not yet passed on the situation before us means we should close our eyes to this denial of equal protection. If there is a denial of equal protection, as I believe there is, then I think we are obligated to remedy it, Art. VI, United States Constitution; Art. I, Sec. 4, Art. VII, Sec. 11, Missouri Constitution of 1945. I would therefore be in favor of ouster.

/s/ ROBERT E. SEILER, JUDGE

APPENDIX C

Judgment, Entered April 24, 1970.

No. 54,606

IN THE SUPREME COURT OF MISSOURI

MARCH SESSION, 1970

STATE OF MISSOURI ON THE INFORMATION OF JOHN C. DANFORTH
Petitioner,

vs.

J. B. "JET" BANKS
Respondent.

Now at this day, comes the said respondent, by attorney, and upon his motion, it is considered and adjudged by the Court that the proceedings of quo warranto herein be, and the same are hereby, dismissed. (Opinion filed.)

APPENDIX D

Motion for Rehearing

(Filed May 7, 1970)

Petitioner, John C. Danforth, Attorney General, moves the court to grant a rehearing in the above case or to modify the opinion and judgment of April 24, 1970, for the following reasons:

1. The Commissioner's report shows affirmatively that the respondent did not reside within the district for which he was elected for one year next preceding the date of his election, and that he was, therefore, ineligible under Article III, Section 4 of the Constitution of Missouri.

2. The petitioner has presented to this court for decision of the question whether the residents of the district purportedly represented by respondent are deprived of equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, by the non-residence of respondent as aforesaid.

3. The majority opinion purports to dispose of the case without reaching a decision on this assigned ground, on the basis of the finding that:

> ". . . From the record before this court, there is no showing that the legislative body neglected its constitutional duty and failed to act in the premises. . . ."

4. In so holding, the court in its opinion overlooks the circumstance that, if the petitioner's equal protection point is sound, then there would be a violation of the Constitution of the United States if the respondent were permitted to serve even though all members of the legislature might consent or agree to his serving.

5. The "equal protection" point, therefore, is necessarily involved in the case and must be decided. It does not

depend on the legislature's action or inaction or on whether the legislature acted with diligence.

Wherefore, the petitioner prays the court to grant rehearing, to decide the question whether the residents of the defendant's district are deprived of equal protection of the laws and for such further relief as may be just in the premises.

Suggestions in Support of Motion for Rehearing

The concurring opinion of Special Judge Fred L. Howard and the dissenting opinion of Judge Robert E. Seiler both hold that the Commissioner's finding that the respondent did not reside within the district from which he was elected for one year prior to the election, as required by Article III, Section 4 of the Constitution, is clearly supported.

Judge James A. Finch, Jr., in his concurring opinion, apparently does not challenge the finding in any way but holds that the point is immaterial since in his opinion there is no violation of the "equal protection" clause of the Fourteenth Amendment.

The majority, joined by Special Judge Howard, purport to dispose of the case without a ruling on the "equal protection" point because they find no evidence of "inaction" on the part of the legislature. It is apparently suggested that there must be some kind of proceeding or record before the legislature before a constitutional violation could be corrected.

If our equal protection point is valid, however, then the respondent is holding office in violation of the Constitution even though every member of the House of Representatives may have acquiesced in, or expressly consented to, his service in spite of his non-residence. It makes no difference whether the legislature has been attentive or inattentive, deliberate or inadvertent.

Kirkpatrick v. Preisler, 394 U.S. 526, 22 L.Ed.2d 519, 89 S.Ct. 1225, reh. den. 395 U.S. 917, 23 L.Ed.2d 231, 89 S.Ct. 1737 (1969), holds that any variation of equality of representation is unconstitutional, if it could have been avoided by any reasonable means.

Lucas v. Colorado General Assembly, 377 U.S. 713, 12 L.Ed.2d 632, 84 S.Ct. 1472 (1964), holds that the voters of a state could not consent to a deprivation of equal protection of the laws, even by majority vote at a state-wide referendum. The legislature **a fortiori** could not consent to the deprivation of a district of a right to representation by a resident, even by unanimous vote or by failure to act. It matters not whether the failure was negligent, deliberate or inadvertent.

There is no way in which an outsider could present a matter for action by the legislature. Legislators alone have this authority.

The court on the record before it must necessarily decide the merits of the petitioner's claim that residents of a district are deprived of equal protection of the laws if they are represented by a non-resident, when the Constitution calls for representation by residents. The majority of the court must decide whether Judge Finch is right on the merits of this issue or whether Judge Seiler is right.

If the latter is the case, then the record shows that the legislature has suffered a situation to continue in violation of the Constitution. Under the approach of the majority opinion, legislators could perpetuate such violations simply by a tacit agreement not to take any action.

The court, therefore, should decide the constitutional question on the merits.

APPENDIX E

Order, Entered June 8, 1970.

No. 54,606

IN THE SUPREME COURT OF MISSOURI

MAY SESSION, 1970

STATE OF MISSOURI ON THE INFORMATION
OF JOHN C. DANFORTH,
Petitioner,

vs.

J. B. "JET" BANKS,
Respondent.

Now at this day, upon consideration of petitioner's motion for rehearing in the above cause, it is ordered by the Court that said motion be, and the same is hereby overruled.

LIBRARY
SUPREME COURT, U. S.
FILED
DEC 9 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 606

THE STATE OF MISSOURI on the Information of JOHN C. DANFORTH, Attorney General,
Petitioner,

vs.

J. B. "JET" BANKS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR RESPONDENT IN OPPOSITION

JOSEPH L. WALSH
Suite 530, Paul Brown Building
818 Olive Street
St. Louis, Missouri 63101
Counsel for Respondent

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Federal and State constitutional provisions involved	2
Statement of the case	3
Argument	6
I. The decision below is clearly correct	6
II. There is no conflict of decision	7
III. There is no important question of Federal law	8
IV. Loss of jurisdiction by mootness	9
Conclusion	10

Cases Cited

Baker v. Carr, 369 U. S. 186	6, 7, 8
Bowling v. Weakley, 181 Md. 496, 30 A. 2d 791	6, 7
French v. State Senate, 146 Cal. 604, 80 Pac. 1031	6
Hiss v. Bartlett, 69 Mass. 468, 473, 63 Am. Dec. 768	6
National Union of Marine Cooks and Stewards v. Arnold et al., 348 U. S. 37	9
Preisler v. Doherty, 364 Mo. 596, 265 S. W. 2d 404	7
Powell v. McCormack, 395 U. S. 486	7, 8
Reif v. Barrett, 355 Ill. 104, 188 N. E. 889	6
State ex rel. Acker v. Reeves, 229 Ind. 126, 95 N. E. 2d 838	6

Statutes Cited

Constitution of Missouri:

Article II, Section 1 3
Article III, Section 4 2
Article III, Section 18 6

Constitution of the United States:

Article I, Section 5 ..... 2, 8
Fourteenth Amendment 7, 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 606

THE STATE OF MISSOURI on the Information of JOHN C. DANFORTH, Attorney General,
Petitioner,

vs.

J. B. "JET" BANKS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Missouri together with two concurring and one dissenting opinion are reported in 454 S. W. 2d 498.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Where the Constitution assigns a particular function wholly and indivisibly to another department, namely, the Legislative Department, can the judiciary intervene?

Also, can a party complain of violation of the equal protection clause where no showing has been made that anyone comparably situated has been treated differently?

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

ARTICLE I

Quorum; journals; adjournments

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as Each House may provide . . .

Constitution of Missouri

ARTICLE III

Section 4. Qualifications of representatives.—Each representative shall be twenty-four years of age, and next before the day of his election shall have been a qualified voter for two years and a resident of the county or district where he is chosen to represent for one year, if such county or district shall have been so long established, and

if not, then of the county or district from which the same shall have been taken.

Section 18. Appointment of officers of houses—jurisdiction to determine membership—power to make rules, punish for contempt and disorderly conduct and expel members.—Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; may determine the rules of its own proceedings, except as herein provided; may arrest and punish by fine not exceeding three hundred dollars, or imprisonment in a county jail not exceeding ten days, or both, any person not a member, who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence during its sessions; may punish its members for disorderly conduct; and, with the concurrence of two-thirds of all members elect, may expel a member; but no member shall be expelled a second time for the same cause.

ARTICLE II

Three departments of government—separation of powers

1. The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collections of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

STATEMENT OF THE CASE

The respondent was duly elected to the Missouri House of Representatives on November 5, 1968, as Representative from the 54th Legislative District. His election was cer-

tified by the Secretary of State of Missouri. The oath of office was duly administered to him, he was seated and established tenure of office as Representative of the 54th District of the House of Representatives of Missouri.

Petitioner filed an Information in the nature of Quo Warranto. Respondent filed a Motion to dismiss the Information, on the ground that the court lacked jurisdiction over the subject matter. The Motion was taken under advisement and a Return was filed.

The Supreme Court of Missouri sustained the Motion to Dismiss on the basis that the State Constitution constituted the House of Representatives "sole Judge" of the election and qualifications of its members.

The court further held that the Legislature in administering the oath of office to respondent and seating him resolved any question of qualification in his favor, and that there was no indication of "inaction" on the part of the Legislature. The majority opinion found no claim of "arbitrary or discriminatory failure to apply uniform standards" or of "invidious discrimination" so as to constitute a violation of the equal protection clause.

The majority opinion further held, in the instant case, "inaction" has neither been alleged nor proven and that from the record before the court, there was no showing that the Legislative Body neglected its Constitutional duty and failed to act in the premises.

There were two concurring and one dissenting opinion.

The Motion for rehearing was filed and a Motion opposing same was filed, the latter demonstrating that the court had resolved the "equal protection point" and that the court's decision was correct.

The Motion for rehearing was denied and the present petition followed.

It is necessary to correct an inaccuracy contained in the third sentence of the initial paragraph of petitioner's Statement of the Case. The record in the case at bar does not show that any member of the House of Representatives did or did not call the attention of the House to any question concerning respondent's right to sit. In fact, the entire record as set out in the various opinions of the Missouri Supreme Court shows complete silence in either allegation or proof by petitioner of what did or did not transpire in the Missouri House of Representatives concerning this question.

ARGUMENT

I

The Decision Below Is Clearly Correct

By enactment of Article III, Section 18 of the Constitution of Missouri, as found by the Supreme Court of Missouri, the people have specifically made a "textually demonstrable constitutional commitment" to its House of Representatives power to be the sole judge of the qualifications of its own members.

The Supreme Court of Missouri relied on the recent decision of the Supreme Court of the United States, Baker v. Carr, 369 U. S. 186, wherein it was determined that the "political question doctrine" would make non-justiciable cases wherein there was found "a textually demonstrable constitutional commitment" of an issue to a coordinate political department.

The Supreme Court of Missouri further found that an attempt to exercise powers specifically delegated to the Legislative Department would constitute an encroachment upon the Legislature by the Court and do violence to the separation of powers vital to our form of government.

The decision of the Supreme Court of Missouri was further correct in that it recognized the principle that legislative bodies are the sole judge of the qualifications of their members; that in the Constitution of the Federal Government and virtually all the states this sound principle exists, is of ancient origin, and was traced by the Court to the Constitutional Law of England in the year 1586. Hiss v. Bartlett, 69 Mass. 468, 473, 63 Am. Dec. 768; State ex rel. Acker v. Reeves, 229 Ind. 126, 95 N. E. 2d 638; French v. State Senate, 146 Cal. 604, 80 Pac. 1031; Reif v. Barrett, 385 Ill. 164, 182 N. E. 899; Bowling v.

Weakley, 181 Md. 498, 30 A. 2d 701; Preisler v. Doherty, 364 Mo. 998, 268 S. W. 2d 494.

The lower court further found that in Baker v. Carr, 369 U. S. 186, it was held that "where the Constitution assigns a particular function wholly and indivisibly to another department, the Federal Judiciary does not intervene".

The Missouri Supreme Court further found that in Powell v. McCormack, 395 U. S. 486, it was said:

> "Contests may arise over whether an elected official meets the qualifications of the Constitution, in which event the House is the sole judge".

The Court correctly found that the Information failed to state a justiciable cause of action.

Concurring opinions of the Missouri Supreme Court correctly found that no violation of the equal protection clause of the 14th Amendment to the Constitution of the United States has been shown and in fact that no violation or "inaction" had either been alleged or proved by petitioner.

II

There Is No Conflict of Decision

Nowhere in the petition for Writ of Certiorari is there any showing of a conflict of decision.

In fact the majority opinion of the Missouri Supreme Court traced an uninterrupted line of decisions dating back over three centuries, including United States Supreme Court and numerous State Supreme Courts.

Petitioner concedes that there is no judicial precedent on the specific issue submitted and cites no decision that might or could be in conflict with that of the Supreme Court of Missouri.

III

There Is No Important Question of Federal Law

Petitioner insists that there lurks an important question of Federal Law which this Court should settle. Strangely, there is no citation, nor any pending litigation, no indication other than for approximately two centuries the Federal Constitution has specifically delegated the power to each House, to judge the qualifications of its members. Petitioner does not contend any of the states having virtually the same provisions regarding the Legislature being the sole judge of the qualifications of its members, has rendered any contrary decision.

In fact the recent decisions of **Baker** v. **Carr**, *supra*, and **Powell** v. **McCormack**, *supra*, clearly held that the assignment of a particular function in the Constitution to another department prohibits the Judiciary from intervening, also deciding that contests arising concerning elected officials' qualifications were to be decided solely by the House. Petitioner seeks to burden this court with a question whose principle is steeped in ancient origin and has been consistently upheld and recently endorsed by this Supreme Court.

It appears that petitioner is pressed into strained thinking in an effort to make the 14th Amendment to the Constitution of the United States apply to any and all questions, situations and controversies. Specifically in this case his contention is directed against Article I, Section 5 of the Constitution of the United States, as well as similar provisions in the Constitutions of virtually all of the sovereign states.

In any event, the record in the case at bar exhibits no allegations, no facts, no evidence, and no proof of what proceedings were or were not held in the House of

Representatives of the State of Missouri concerning this matter, but rather the record is totally silent on this point.

In addition, the record is also completely silent as to allegations, evidence, facts or proof as to what measures or proceedings were conducted to test the qualifications of the other 162 members of the House of Representatives of Missouri. Further, the record in no way alleges, establishes or proves that the qualifications of any other member of the House of Representatives were tested in any different manner or by any different standards than those of respondent. This court in National Union of Marine Cooks and Stewards v. Arnold et al., 348 U. S. 37, at page 41, held as follows:

> "We have no difficulty with the equal protection clause because no showing has been made that anyone comparably situated has been treated differently from petitioner".

Petitioner should not be permitted to pit the United States Supreme Court against the Congress and Senate and the Legislatures of all the various states in an area in which the Federal Constitution and all the State Constitutions specifically delegated the power to the legislative bodies to judge the qualifications of their own members.

IV

Loss of Jurisdiction by Mootness

Respondent advises the court of certain facts which in respondent's view renders this cause moot. This court has constitutional jurisdiction only over actual cases and controversies, between adverse intepests with respect to which the court's judgment will be effective.

In the instant case respondent's term of office will expire on December 31, 1970. At that time, the controversy will have become academic by reason of the changed circumstances, and the court's jurisdiction will have ceased. Obviously, it appears well nigh impossible for the court to render a judgment which will be effective prior to December 31, 1970, on which date respondent's term in office will have ended.

Petitioner has no standing to request that this court issue advisory opinions on the questions presented for use in possible future situations.

In other words, petitioner is seeking to invoke the Certiorari jurisdiction of this court on what will shortly become an abstract question. This he may not do.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH L. WALSH
530 Paul Brown Building
818 Olive Street
St. Louis, Missouri 63101
Counsel for Respondent

CASES CITED

Baker v. Carr, 369 U.S. 186 2

Powell v. McCormack, 395 U.S. 486 2

State ex inf. Dalton v. Mosley, 365 Mo. 711, 286 S.W.2d 721 2

State ex inf. McKittrick v. Graves, 346 Mo. 990, 144 S.W.2d 91 3

State ex inf. McKittrick v. Wymore, 345 Mo. 169, 132 S.W.2d 979 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 606

THE STATE OF MISSOURI ON THE INFORMATION OF JOHN C. DANFORTH, ATTORNEY GENERAL,
Petitioner,

vs.

J. B. "JET" BANKS,
Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF MISSOURI

PETITIONER'S REPLY BRIEF

ARGUMENT

I.

The major portion of the Brief in Opposition touches and concerns the merits, as described in our petition. We have the following additional obeservations:

(a) Since the court below ruled the case on Motion to Dismiss, the petitioner's factual contentions are taken as

true, in accordance with the universal rule of pleading. The court below decided the case on its conception of the governing law, without determining any facts.

(b) The quotations on page 7 of the Brief in Opposition, from Baker v. Carr, 369 U.S. 186 and Powell v. McCormack, 395 U.S. 486, are fully and adequately answered in Footnote 1 of the concurring opinion of Judge Seiler, as set out in Appendix B-4 to the petition, page 31.

II.

The case of State ex inf. McKittrick v. Wymore, 345 Mo. 169, 132 S.W.2d 979 (1939), cited in the petition, shows definitely and certainly that the case is not rendered moot by the expiration of the term for which the respondent was elected. Since respondent asserts mootness without discussing this case, the details have some significance.

In **Wymore** it was charged that the respondent, a prosecuting attorney, had forfeited his office and that his continued tenure rendered him an usurper. Before the case was determined the respondent's term expired and he was elected to another term. The court held that the case was not moot. It found that the charges of usurpation had been established, and assessed a fine against respondent for his usurpation during the prior term. The court did not disturb the respondent in his current term, because no charges were made about anything except the prior term.

The Missouri court could obviously take similar action in this case, and would do so, but for the obstacle of the federal question which it erroneously failed to decide.

A fine is the usual and established procedure in Missouri when a public officer is determined to be a usurper. The fine is assessed in civil quo warranto proceedings such as this one. State ex inf. Dalton v. Mosley, 365 Mo. 711, 286

S.W.2d 721 (1956); State ex inf. McKittrick v. Graves, 346 Mo. 990, 144 S.W.2d 91 (1940).

Respectfully submitted,

JOHN C. DANFORTH
Attorney General
Supreme Court Building
Jefferson City, Missouri 65101

CHARLES B. BLACKMAR
Special Ass't. Attorney General
7305 Maryland
St. Louis, Missouri 63130
Counsel for Petitioner